IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT KOFI ACHEAMPONG,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 99-6133
	:	
Defendant.	:	

MEMORANDUM AND ORDER

DAVIS, J. October 16, 2002

I. INTRODUCTION

On December 10, 1999, Albert Kofi Acheampong ("Acheampong") filed suit against the United States Government ("the Government") claiming that it was liable under the Federal Tort Claims Act ("FTCA"), 28 USCA §§ 1346(b), 2671-2680 (1988), for wrongful possession of $25,705 bond money paid to the Immigration and Naturalization Service ("INS") by Capital Bonding Company/Frontier Insurance Co. ("Capital/Frontier") upon Acheampong's failure to appear for his deportation hearing on April 15, 1996.[1] In the Motion presently before the Court,

[1] The Government filed a Motion to Dismiss on February 24, 2000 to which Acheampong responded in opposition on March 6, 2000. Plaintiff's petition to proceed in *forma pauperis* was granted on April 5, 2000. On September 20, 2001, the Government's Motion to Dismiss was denied, the Government was ordered to complete discovery and file its Answer by November 19, 2001. An answer was not filed. On December 12, 2001, Acheampong filed for Entry of Default to which the Government responded on December 17, 2001. Plaintiff opposed the Government's Opposition on December 31, 2001. The Government filed a Motion for Summary Judgment on February 15, 2002, to which Acheampong responded in opposition on March 4, 2002. The matter was transferred to this Court on May 20, 2002.

the Government seeks summary judgment under Rule 56 of the Federal Rules of Civil Procedure on Acheampong's FTCA claim. For the reasons given below, the Government's Motion for Summary Judgment will be granted.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court is required, in resolving a motion for summary judgment pursuant to Fed. R. Civ. P. 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence presented by the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the non-movant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. FACTUAL BACKGROUND

On April 15, 1996, Acheampong failed to appear for his scheduled INS hearing in New York, New York. The hearing was held in absentia and he was ordered to be deported back to

Ghana at the conclusion of the federal sentence that would be imposed pursuant to his June 1995 drug trafficking arrest. Upon Acheampong's failure to appear for the hearing, the INS breached Acheampong's immigration delivery bond and requested payment of the bond money from Capital/Frontier in the amount of $25,705.

Acheampong – an illegal alien and subject of Ghana – had been apprehended by the INS in June of 1995 in Philadelphia, Pennsylvania. Subject to deportation proceedings after sustaining a federal conviction, Acheampong was required to furnish an immigration delivery bond to the Government in the amount of $25,000 to ensure his appearance at his April 15, 1996 INS hearing. Acheampong's wife paid Capital Bonding Company, an authorized agent for Frontier Insurance Co., a sum – the amount of which is in dispute – to obtain an alien delivery bond. Accordingly, on June 5, 1995 Capital/Frontier posted an appearance ("surety") bond in the amount of $25,000 to the INS to secure Acheampong's release during the pendency of his deportation proceedings and not to be collected on the condition that he attend his INS hearing.

Both parties agree that Acheampong did not appear for his scheduled deportation hearing on April 15, 1996. Rather, factual disputes have arisen over the events which occurred contemporaneously with the hearing and during the subsequent 45 months prior to this suit. Acheampong asserts that he did not appear because he was involved in a car accident en route to the hearing and was subsequently hospitalized but contacted his attorney who in turn gave notice to the INS of his anticipated absence. Consequently, Acheampong argues that he was medically unavailable on April 15, 1996 and thus not at fault for failing to present himself to the INS. Based on his belief that his absence was legally justified, Acheampong claims that he did not know and should not have known that the INS breached his immigration bond until he contacted

Capital/Frontier on March 11, 1999 requesting the full amount of the bond. Prior to the response he received from Capital/Frontier – over three years after his original hearing – informing him of the INS's breach, Acheampong does not claim to have made any efforts to contact the INS or Capital/Frontier; such as inquiring into the status of his deportation process, providing the INS with an explanation for his absence, attempting to schedule another hearing, and/or appealing his deportation.

Acheampong states he sent the INS three letters demanding that the full amount of the bond money (the face of the bond plus interest accrued) which Capital/Frontier paid to the INS be given to him. Acheampong also advised he wrote a letter and completed a Federal Tort Claims Act Form which he sent to the INS in Washington, D.C. The INS, however, has no record of receiving such letter and neither Acheampong nor the prison authorities[2] which allegedly sent the letter have documentary evidence that his Federal Tort Claims Act Form was in fact mailed to the INS on May 25, 1999, or on any other date. Acheampong did not receive a response from the INS to his FTCA claim.

Six months later, on December 10, 1999, Acheampong filed suit in this Court under the FTCA, arguing that because he was not at fault in failing to attend his hearing the INS was not legally justified in collecting his immigration bond from Frontier. According to Acheampong, the INS is wrongfully in possession of 'his' money and therefore he is entitled to have the INS pay him the sum of $25,705 which Capital/Frontier paid the INS, plus interest.

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[2] Acheampong was arrested in June 1995 for drug trafficking in Connecticut and remained out of custody until at least June 26, 1996, on which date he was indicted on four separate narcotics charges and one charge of resisting arrest and later convicted in District Court in Connecticut and sentenced to a term of total confinement to end on or about May 24, 2004. USA v. Acheampong, 1996 WL 684417 (D.Conn., October 8, 1996).

IV. DISCUSSION

A. Claim Against the INS under the Federal Tort Claims Act

Acheampong has not made out a *prima facie* case on his tortious conversion claim pursuant to the Federal Tort Claims Act, 28 USCA §§ 1346(b), 2671-2680 (1988), ("FTCA claim"), sufficient to survive the Government's Motion for Summary Judgment.

i. Filing Requirements under the FTCA

Acheampong has not satisfied the burden necessary to sustain the claim that he filed an administrative tort claim with the FTCA. Consequently, his claim is improperly presented for the Court's consideration for lack of subject-matter jurisdiction. Under the doctrine of sovereign immunity, the government's exposure to liability can be no greater than it permits. Barren v. United States, 829 F.2d 987, 992 (3d Cir. 1988); Deakyne v. Department of Army Corps of Engineers, 701 F.2d 271, 274 n.4 (3d Cir.), *cert. denied*, 464 U.S. 818, 78 L. Ed. 2d 89, 104 S. Ct. 78 (1983). The FTCA waives the sovereign immunity of the United States in civil actions for money damages arising from the negligence or a wrongful act of an employee of the United States acting within the scope of his or her employment. Bradley v. United States, 856 F.2d 575, 577-78 (3d Cir. 1988); Anderson v. United States, 744 F. Supp. 641, 643 (E.D. Pa. 1990). It is only under the FTCA that the terms of the United States' consent to be sued, and thus the jurisdiction of the federal district courts, is defined. Bialowas v. United States, 443 F.2d 1047, 1048-49 (3d Cir. 1971). The FTCA provides that an action *shall not* be instituted upon a claim against the United States for money damages for loss of property unless the claimant shall have *first* presented the claim to the appropriate Federal Agency *and* his claim shall have been finally

denied by the agency in writing and sent by certified or registered mail. 28 U.S.C.A. §§ 2675(a), 2401(b) (emphasis added). McNeil v. United States, 508 U.S. 106, 107, 113 S. Ct. 1980, 1981, 124 L.Ed. 2d 21, 25 (1993) (An action may not be commenced under the FTCA unless the claimant has first exhausted his administrative remedies prior to filing suit.); Livera v. First Nat'l Bank, 879 F.2d 1186, 1194 (3d Cir.) (The fact that an administrative complaint under 28 U.S.C. § 2675(a) must first be presented to the proper agency is a jurisdictional requirement that is not subject to waiver by the government and which must be strictly construed.) *cert. denied*, 493 U.S. 937, 110 S.Ct. 332, 107 L.Ed. 2d 322 (1989).

Acheampong's unsupported assertions fail to satisfy the factual prerequisites essential to federal court jurisdiction under the FTCA. Acheampong has not offered demonstrable evidence of having filed an initial FTCA claim with the INS and the INS does not have a record of ever receiving such a complaint. Despite Plaintiff's assertion that he gave his complaint to prison authorities, he has failed to provide any supporting evidence from the prison in the form of a record or validation, or otherwise. By contrast, the INS produced an affidavit from David Don, Esquire, Assistant Regional Counsel of the INS, in which Mr. Don avers he never received a complaint from the Plaintiff.[3] In the face of the INS's affidavits that it did not receive the complaint, Acheampong's claim fails.[4] Barren v. United States, 839 F.2d 987 (3d. Cir. 1988); Moya v. United States, 35 F. 3d 501, 502-503 (10th Cir. 1994) (Under the FTCA, "a claim shall

[3] Don Affidavit, 2/24/00, attached to Defendant's Motion for Summary Judgment.

[4] "The FTCA requires as a prerequisite to suit that the 'claimant shall have first presented the claim to the appropriate Federal agency.' 28 U.S.C. §2675(a). Section 2401(b) provides that '[a] tort claim against the United States shall be forever barred unless it is begun within six months after the date of mailing...of notice of final denial of the claim by the agency to which it was presented.' Within six months following notice of a 'final denial,' a claimant may either file suit in district court, 28 U.S.C. §2401(b), or file a request for reconsideration with the agency, 28 C.F.R §14.9(b). If unsatisfied with the resolution of the request of the request for reconsideration, a claimant has six months from the date of filing the request to bring suit in district. 28 C.F.R. §14.9(b)."

be deemed to have been presented when a Federal agency *receives* from a claimant [her] administrative notice of claim.")[5] The Court finds that Acheampong has failed to satisfy his burden of establishing that the INS received his FTCA complaint. The copy of an unsigned SF-95, standing alone, is legally insufficient proof of the INS's alleged receipt of Acheampong's FTCA claim. Bailey v. United States, 642 F.2d 344, 346-347 (plaintiff has the burden of establishing presentment and explaining that mailing alone is insufficient for presentment); Dark v. United States, No. CIV.A. 91-1438, 1991 U.S. Dist. LEXIS 10551 (E.D. Pa. 1991) (plaintiff's burden to show post office received claim), *aff'd*, 961 F.2d 1566 (3d Cir. 1992); Anderson v. United States, 744 F. Supp. 641, 643, 644 & n.5 (E.D. Pa. 1990) (government's motion to dismiss granted where plaintiff had no receipt to prove FTCA claim was timely presented to appropriate agency).

Despite Acheampong's arguments to the contrary, the 'prison mailbox rule' does not save his claim.[6] He asserts that because he filed his complaint *pro se* from the prison, the 'prison

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[5] In Moya the plaintiff filed a FTCA claim with the Veterans Administration and received notice of final denial of her claim on June 16, 1992. Although she filed her claim in district court more than eleven months later, Moya argued that her claim was not barred because she had filed a motion for reconsideration, as required by statute, on October 16, 1992. The plaintiff produced an affidavit from her attorney stating that the motion had been sent via certified mail. She could not, however, produce a certificate of mailing, a return receipt or a certified mail number. The Veterans Administration denied ever receiving the Motion for Reconsideration and presented affidavits reflecting unsuccessful searches in two locations for Moya's motion. The district court, affirmed by the 10th Circuit Court of Appeals, treated the motion for reconsideration in the same manner as it would the filing of an initial agency claim. Consequently, the court held that receipt by the agency is the criterion for presentment of the complaint, and that in the case before it, since no "reasonable person could conclude that the VA received the request," there was no question of material fact that remained. The District Court's grant of summary judgment to the VA was upheld.

[6] Acheampong relies on Huizar v. Carey, 273 F. 3d 1220 (9th Cir. 2001) for the proposition that the "prison mailbox rule," which in this case was held to apply to the situation where a *pro se* prisoner files a habeas corpus petition by giving it to a prison official, even though the petition is never filed. Petitioner attempts to bolster his claim by pointing out that he filed his lawsuit six months after he gave his agency complaint to prison authorities, thus showing he acted with "reasonable diligence." Id. However, what Acheampong cannot do, and has not done, is to offer any proof of having mailed his complaint. He has not offered a prison log, certified mail receipt, or postmark date, as would be required on Tax Court petitions (analogous to a claim with INS as both are administrative agencies).

mailbox rule' should apply according to which his affirmation of having handed his FTCA claim to prison officials for mailing should suffice to prove that he did in fact mail his complaint to the INS. Contrary to Aceampong's assertion, the Supreme Court, in the leading case regarding the application of the 'mailbox rule' to *pro se* prisoners' habeas corpus petitions, articulated that it is a "bright line rule" that even the act of handing a complaint to prison authorities for mailing must be documented. Houston v. Lack, 487 U.S. 266, 275 (1988);[7] Gomez v. Castro, 2002 U.S. App. LEXIS 20129 at *3 (9th Cir. 2002).

In conclusion, the Court is without jurisdiction over the Plaintiff's grievances for two reasons. First, the evidence Acheampong submitted is plainly insufficient on the issue of whether he filed a claim with the INS. Second, as the INS is without evidence of receipt of Acheampong's claim, the grievance has not been denied in writing as required by 18 U.S.C. § 2675(a) or 2401(b). These elements are jurisdictional requirements which are not subject to waiver by the government and which must be strictly construed. Livera, *supra* at 1194.

ii. FTCA's Statute of Limitations

Assuming *arguendo* that Acheampong had filed a proper FTCA complaint with the INS, it would be barred by the applicable statute of limitations and therefore beyond the Court's

[7] "The *pro se* prisoner does not anonymously drop his notice of appeal in a public mailbox – he hands it over to prison authorities who have well-developed procedures for recording the date and time at which they receive papers for mailing and who can readily dispute a prisoner's assertions that he delivered the paper on a different date. Because reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the *pro se* prisoner delivers the notice to prison authorities for mailing is a bright-line rule, not an uncertain one."

jurisdiction.[8] Under the clearly defined statutory time frame, the two year mandated period to file a FTCA suit began to run when the "action accrued" on June 11, 1996 and expired almost a year prior to the day when Acheampong allegedly delivered a letter and SF-95 form to prison authorities for mailing to the INS.

The "action accrued" when the INS breached the immigration bond as a consequence of Acheampong's failure to attend his hearing. In his Opposition to Defendant's Motion to Dismiss, Acheampong argues that the 'delivery exception' to the two year statute of limitations applies to the facts of his case because he did not know, and should not have known, that the INS breached the bond until he received the letter from Capital/Frontier.

Acheampong argues that he did not know that the INS had collected the delivery bond and that there was no reason he should have known that the INS would demand payment from Capital/Frontier after he failed to appear at his scheduled INS hearing. In Acheampong's mind, because it was not his fault that he missed the hearing, because he contacted his attorney who he believed contacted the INS, and because he produced an undated, unsigned letter from a doctor for the purpose of this litigation, the INS was without legal authority to revoke the bond of an illegal alien released on $25,000 bail pending his sentencing on four drug counts and one charge of resisting arrest who did not appear for the hearing date at which he was ordered deported back to Ghana. Three years later, Acheampong wants the INS to pay him more money than he ever paid Capital/Frontier because under the terms of his private contract with Capital/Frontier, to which the INS was not a party, he did not substantially breach his delivery bond when he did not

[8] "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C.A. § 2401.

appear. The Court disagrees.

Under the INS regulations as applied to the facts of this case, Acheampong breached his immigration bond in that his failure to appear was a substantial violation of the stipulated conditions of his bond:

> According to INS regulations, bonds that are posted to ensure the delivery of aliens are 'breached when there has been a substantial violation of the stipulated conditions. 8 C.F.R. 103.6(e) (1995). Thus, substantial performance of all conditions imposed by ...a bond shall release the obligor from liability. Id. ... In evaluating whether a bond violation is substantial, we look for four factors: (1) the extent of the breach; (2) whether it was intentional or accidental on the part of the alien; (3) whether it was in good faith; and (4) whether the alien took steps to make amends or place himself in compliance.

Ruiz-Rivera v. Moyer, 70 F. 3d 498 (7th Cir. 1995).[9]

An alien's failure to attend his INS hearing is a significant breach of a bond, yet Plaintiff did not attempt to "make amends or place himself in compliance." Acheampong seeks refuge in the purported accidental nature of his breach yet he never appeared at the INS even though he remained out of custody until at least July 26, 1996, the date of the filing of the Connecticut federal indictment. Furthermore, the note from Plaintiff's physician is vague, unverifiable and of no value. (Exhibit "C"; Plaintiff's Opposition to Government's Motion for Summary Judgement Under Rule 56) Matter of Arbelaez-Naranjo, 18 I. & N. Dec. 403 (1983)("without date, time, and type of treatment, and nature of illness," the doctor's note was held "insufficient to establish

[9] In Ruiz-Rivera the plaintiff posted bond for her husband which required him to appear for each and every request of the INS, and was advised that she would forfeit the bond if he failed to appear. Her husband received ample notice of the hearing at issue and intentionally failed to appear at the INS in Louisiana, remaining in Chicago to file an emergency petition for a stay of deportation. He did appear the next day, however, claiming that had taken the first flight after filing his emergency petition. Nevertheless, the court found that the failure to appear at the INS hearing was a substantial breach of the bond. Coupled with the intentionality of the failure to appear at the hearing, and despite the fact that he did appear the following day, the Seventh Circuit Court of Appeals upheld the INS' interpretation of its own rules.

an excused nonappearance.") In sharp contrast to the plaintiff in Arbelaez-Naranjo, who at least presented himself at the INS the following day, Acheampong never appeared. In conclusion, despite his protestations to the contrary, Acheampong has not produced sufficient evidence to justify any reasonable fact finder in concluding that he did not breach the conditions of his bond under the regulations of the INS. Accordingly, Capital/Frontier as 'obligor' was legally justified in paying the bond money to the INS.

B. Claim for Improper Conversion of Property Under Pennsylvania Law

Plaintiff argues that he had an immediate possessory right in the bond money paid by Capital/Frontier to the INS when he did not appear for his hearing because he did not wilfully give up his right to possession by a wilful failure to appear. Acheampong contends that as his failure to appear was not his fault, that he should not have been penalized in the first place, and that Capital/Frontier should never have been required to pay the bond to the INS. The Court is not convinced by Acheampong's arguments and finds that contrary to his assertions, his failure to appear for the deportation hearing gave the INS the right to breach the bond, which Capital/Frontier in turn legitimately paid.

Under Pennsylvania law, "conversion [is] the 'deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification.' Schulze v. Legg Mason Wood Walker, Inc., 865 F. Supp. 277, 284 (W.D. PA 1994). The plaintiff may bring suit 'if he or she had either actual or constructive possession, or an immediate right to possession of the chattel at the time of conversion.' Eisenhower v. Clock Towers Assocs., 399 Pa. Super. 238, 582 A. 2d 33, 36 (1990). In the absence of actual or

constructive possession, the rights to possession must be immediate.'" Feinberg v. Central Asia Capital Corp., Ltd., 974 F. Supp. 822 (E.D. Pa 1997).

Under Pennsylvania law, Acheampong does not have a claim for improper conversion against the INS. First, at the time the bond was breached, Acheampong was not the "owner" of the property, that is the bond. Acheampong did not and does not have possession, either actual or constructive, or an immediate right thereto in the $25,705 paid to the INS when he failed to appear for his hearing.

Moreover, Acheampong's arguments regarding his contract with Capital/Frontier are irrelevant as they address the terms and conditions of a private contract between parties that is not at issue in the case before the Court. The INS never entered into a private contractual agreement with Acheampong. Their only relationship was through Capital/Frontier pursuant to which the INS would release Acheampong upon the payment of immigration bond by Capital/Frontier on condition that Acheampong would present himself on the day of his hearing.

The Court therefore concludes that Acheampong has no right to the return of any money from the INS. The INS legally breached Acheampong's bond when he failed to appear for his deportation hearing on April 15, 1996, and Capital/Frontier legitimately paid the bond. The INS is therefore properly in possession of the bond. If Acheampong has any claim for improper conversion, it is with Capital/Frontier as a private matter, and not with the INS. Accordingly, Plaintiff's claims against the INS are without validity.

For the foregoing reasons, the Government's Motion for Summary Judgment is granted. In light of the decision on the defendant's Summary Judgment Motion, this court need not address the Defendant's final claim that the case should be transferred to district court in Burlington,

Vermont.

The Government's Motion for Summary Judgment is GRANTED. The Plaintiff's Motion for default judgment is DENIED. An appropriate ORDER follows.

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT KOFI ACHEAMPONG,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 99-6133
	:	
Defendant.	:	

ORDER

AND NOW, this day of October, 2002, upon consideration of the Plaintiff's Motion for Default Judgment, filed December 12, 2001, the Government's opposition to Entry of Default Judgment filed December 17, 2001, and Plaintiff's Reply in opposition to the Government's opposition filed December 31, 2001, Plaintiff's Motion for Default Judgment is formally DENIED.

Further, upon consideration of the Government's Motion for Summary Judgment and Plaintiff's Opposition to the Motion for Summary Judgment , IT IS HEREBY ORDERED that the Government's Motion for Summary Judgment is GRANTED and Plaintiff's Opposition to the Motion for Summary Judgment is DENIED.

BY THE COURT:

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Legrome D. Davis
United States District Judge
Eastern District of Pennsylvania